Supreme Court, U.S.
FILED

09-569 NOV 6 - 2009

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ROBERT BYLIN AND SANDIE BYLIN,
HUSBAND AND WIFE,
Petitioners,

v.

JOHN R. BILLINGS; OWEN TUCKER;
OPEN CREEK OUTFITTING, LLC;
OPEN CREEK OUTFITTERS, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

GERARD R. BOSCH
LAW OFFICES OF JERRY BOSCH, LLC
6320 PAINTBRUSH TRAIL
P.O. BOX 872
WILSON, WY 83014
307-734-9778

Counsel for Petitioners

MEL C. ORCHARD, III
Counsel of Record
THE SPENCE LAW FIRM, LLC
15 SOUTH JACKSON STREET
P.O. BOX 548
JACKSON, WY 83001
307-733-7290

Counsel for Petitioners

November 6, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether a party is denied due process of law by a federal district court's order allowing the untimely filing of a statute of limitations defense without the district court giving notice and an opportunity to be heard to the party in direct contravention of local rules of procedure and the district court's oral representations to party's counsel.

2. Whether a party is denied due process of law by a federal court of appeals' denial to hear issues raised on appeal pursuant to 28 U.S.C. § 1291 where the party is prohibited from raising these issues because the lower court denied the party an opportunity to be heard.

3. Whether Federal Rule of Civil Procedure 15(a) requires the moving party to prove good cause for its undue delay in filing a motion for leave to amend an answer to add a statute of limitations defense for the first time under the following circumstances: (1) months after the close of discovery, (2) months after deadline for dispositive motions and (3) on the eve of trial.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 3

1. Whether a party is denied due process of law by a federal district court's order allowing the untimely filing of a statute of limitations defense without the district court giving notice and an opportunity to be heard to the party in direct contravention of local rules of procedure and the district court's oral representations to party's counsel. 8

2. Whether a party is denied due process of law by a federal court of appeals' denial to hear issues raised on appeal pursuant to 28 U.S.C. § 1291 where the party is prohibited from raising these issues because the lower court denied the party an opportunity to be heard. 11

3. Whether Federal Rule of Civil Procedure 15(a) requires the moving party to prove good cause for its undue delay in filing a

motion for leave to amend an answer to add a statute of limitations defense for the first time under the following circumstances: (1) months after the close of discovery, (2) months after deadline for dispositive motions and (3) on the eve of trial 14

REASONS FOR GRANTING THE WRIT 17

1. The importance of due process and fundamental fairness in the administration of justice warrants this Court's guidance for district courts and court of appeals on the due process implications of blithely ignoring rules of procedure. 17

2. This Court should resolve the disagreement amongst the circuits as to whether or not undue delay alone is sufficient to warrant the denial of leave to amend without some showing of good cause for the undue delay. 18

CONCLUSION 19

APPENDIX

Appendix A: Tenth Circuit Opinion (June 23, 2009) 1a

Appendix B: District Court Order Dismissing All Claims (Feb. 28, 2008) 16a

Appendix C: District Court Order Granting Defendants' Motion for Leave

to Amend Their Answer
(Jan. 16, 2008) 23a

Appendix D: Tenth Circuit Order Denying Rehearing
(August 10, 2009) 28a

Appendix E: Excerpts from Transcript of Final Pretrial Conference
(Jan. 8, 2008) 30a

TABLE OF AUTHORITIES

Cases

Andrx Pharms., Inc. v. Elan Corp.,
421 F.3d 1227 (11th Cir. 2005) 16

Armstrong v. Manzo,
380 U.S. 545 (U.S. 1965) 9, 10

Arthur v. Maersk, Inc.,
434 F.3d 196 (3d Cir. 2006) 16

Atchinson v. Dist. of Columbia,
315 U.S. App. D.C. 318, 73 F.3d 418 (D.C. Cir. 1996) 15

Blair v. Oesterlein Co.,
275 U.S. 220 (1927) 13

Block v. First Blood Assocs.,
988 F.2d 344 (2d Cir. 1993) 15, 18

Bowles v. Reade,
198 F.3d 752 (9th Cir. 1999) 15

Cummings v. Norton,
393 F.3d 1186 (10th Cir. Utah 2005) 13

Doe v. Cassel,
403 F.3d 986 (8th Cir. 2005) 15

Doherty v. Davy Songer, Inc.,
195 F.3d 919 (7th Cir. 1999) 15

Duignan v. United States,
274 U.S. 195 (1927) 13

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999) 15

Foman v. Davis,
371 U.S. 178 (1962) 14

Hammond Packing Co. v. Arkansas,
212 U.S. 322 (1909) 9

Hayes v. New England Millwork Distribs., Inc.,
602 F.2d 15 (1st Cir 1979) 16

Hovey v. Elliott,
167 U.S. 409 (1897) 9

In re Consolidated United States Atmospheric Testing Litig.,
820 F.2d 982 (9th Cir. 1987) 9

Johnson v. Mammoth Recreations,
975 F.2d 604 (9th Cir. Cal. 1992) 12

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (U.S. 1982) 8

Mayeaux v. La. Health Serv. & Indem. Co.,
376 F.3d 420 (5th Cir. 2004) 15

McGoldrick v. Compagnie Generale Transatlantique,
309 U.S. 430 (U.S. 1940) 13

McKnight v. Kimberly Clark Corp.,
149 F.3d 1125 (10th Cir. 1998) 16

Minter v. Prime Equipment Co.,
451 F.3d 1196 (10th Cir. 2006) 12, 16, 18

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 8, 9

NLRB v. Horn & Hardart Co.,
439 F.2d 674 (2d Cir. 1971) 11

Scottsdale Ins. Co. v Okla. Transit Auth., Inc.,
2007 U.S. Dist. LEXIS 69857 (N.D. Okla. Sept. 20, 2007) 13

SIL-FLO, Inc. v. SFHC, Inc.,
917 F.2d 1507 (10th Cir. 1990) 12

Societe Internationale v. Rogers,
357 U.S. 197 (1958) 8

Stewart v. U.S. Dept. of Interior,
554 F.3d 1236 (10th Cir. 2009) 13

United States v. Diaz-Villafane,
874 F.2d 43 (1st Cir. P.R. 1989) 11

United States v. Ferretti,
635 F.2d 1089 (3d Cir. Pa. 1980) 10, 11

Wade v. Knoxville Utils. Bd.,
259 F.3d 452 (6th Cir. 2001) 15

Constitution

Due Process Clause 8, 18

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 ..... 1, 11

Rules

F.R.C.P. 1 19
F.R.C.P. 15 ..... 14, 18
F.R.C.P. 15(a) 3, 14
F.R.C.P. 16 12
F.R.C.P. 16 advisory committee's notes (1983 amendment) 12
F.R.C.P. 16(d) 12
Wyo. D. C. L. R. Civ. P. 7.1(b)(1)(B) 2, 7
Wyo. D. C. L. R. Civ. P. 15.1 ..... 3, 7

Robert and Sandie Bylin, husband and wife, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 568 F.3d 1224 and is reproduced in the Appendix at 1a. The decision of the U.S. District Court for the District of Wyoming is not reported but is reproduced in the Appendix at 23a.

JURISDICTION

The judgment of the court of appeals was issued on June 23, 2009. Pet. App. 1a. Petitioner timely filed a petition for rehearing and rehearing was denied on August 10, 2009. Pet. App. 28a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the

Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

Wyo. D. C. L. R. Civ. P. 7.1 Motions

* * *

(b) Filing of Written Briefs.

(1) Non-Dispositive Motion.

* * *

(B) Briefs. A party who files a non-dispositive motion shall include in the motion a short, concise statement of the arguments and authorities in support of the motion. In the alternative, a separate written brief may be filed with the motion, if counsel so desires. Each party opposing the motion shall, within ten (10) days (excluding weekends and holidays) after service of said motion, serve upon all parties a written response containing a short, concise statement of the argument and authorities in opposition to the motion. Failure of a responding party to serve a response within the ten (10) day time limit, or such other time limit as the Court may direct, may be deemed by the Court in its discretion as a confession of the motion.

* * *

Wyo. D. C. L. R. Civ. P. Rule 15.1 Motions to Amend

> (a) Motions to Amend Pleadings. Motions to amend pleadings pursuant to Fed. R. Civ. P. 15(a) shall include a representation that the movant conferred with the opposing party to determine if the opposing party objected to the motion. The motion shall also include a representation whether or not the opposing party has an objection to the motion. If the motion states the opposing party has no objection, the movant shall furnish the Court with a proposed order which the Court will sign. If the motion indicates there is an objection, the Court will consider the objection after response is filed and may decide the matter upon the pleadings or upon hearing.

STATEMENT

This case concerns the due process rights that should be afforded the average litigant who has exercised her rights to pursue state tort law claims. More specifically, whether a district court can unilaterally shorten the time period within which a party can respond effectively negating a party's fundamental due process right to be heard on motions impacting substantial rights. Further, this case concerns the court of appeals' actions in perpetuating the deprivation of due process by failing to consider Petitioner's arguments relying on the general rule of appellate practice that a reviewing court will not consider arguments not raised below. Lastly, there is a split in the circuits as to a court's focus in

considering motions to amend pleadings to assert last minute claims.

In October of 2003, Petitioner Robert Bylin suffered severe and permanent neurological and vascular injuries when his pelvis was fractured in half during a back country hunting trip that was supposed to be supervised and guided by Respondents. Prior to 2003, Respondent Billings owned and operated a hunting camp under the name "Open Creek Outfitting" in a remote section of the northwest corner of Wyoming – just south of Yellowstone National Park. Prior to 2003, Respondent Billings lost his Wyoming outfitter's license for a third time due to various infractions including client safety issues. A license is necessary to operate a hunting camp in Wyoming. Prior to the 2003 hunting season, Respondent Billings along with his friend Respondent Tucker devised a plan to circumvent the Wyoming license requirements by making Respondent Tucker a "partner" in the Respondent limited liability company so that Respondent Tucker could use his newly acquired outfitter's license to continue Respondent Billing's operations. According to Respondent Tucker, he had absolutely no involvement in the operations of the hunting camp, did not guide hunters such as Petitioner and did not supervise hunts or operations.

Respondents Billings, Tucker and Open Creek Outfitting, LLC ("OCO") answered the Complaint on May 23, 2007, setting forth numerous affirmative defenses – but no mention of a statute of limitations defense. On June 27, 2007, an initial pretrial conference was held and there was no mention of a statute of limitations defense and no mention of such was set forth in the district court's "Initial Pretrial

Order." The district court established a deadline for discovery and dispositive motions of November 2, 2007. The magistrate judge who issued the order, however, failed to comply with the local rules and establish a deadline for amendments to pleadings.

On October 16, 2008, after written discovery and numerous depositions, Respondents filed a motion for summary judgment with no mention of any statute of limitations defense. A final pretrial conference was set for January 8, 2008, with a jury trial starting January 28, 2008. Respondents filed their final pretrial memorandum on December 28, 2008 – no mention of a statute of limitations defense. On January 7, 2008, the Court disseminated a "Proposed" Final Pretrial Order, with no mention of any statute of limitations defense. The district court did note that Petitioners requested some amendments to the pleadings with respect to a count of fraud against Respondent Billings and one for piercing the corporate veil.

On the morning of the day prior to the final pretrial – while the parties were taking the deposition of a liability expert in Denver, Colorado – Respondents' counsel informed Petitioners' counsel of their filing of a motion for leave to amend. The next morning at the final pretrial, Respondents raised their motion for leave to amend, and the court stated: *"[i]t just -- it is a waivable defense. It is a defense that must be specifically alleged under Rule 8(c), and it was not, and here we are at the eleventh hour. It is gone."* Pet. App. 32a. The district court went further and stated that: *"I know the standard is prejudice to this side, and it's a tremendous prejudice to this side. ...They've prepared -- I mean, there are volumes of information on this case been prepared, witnesses have been lined up, doctors*

have been arranged, transportation. We're at the trial." Pet. App. 32a.

Petitioner's counsel noted at the final pretrial that he had not had an opportunity to read the Respondents' motion and/or research the issue of amending at such a late date. Counsel made some arguments that he thought may preclude amendment, but specifically requested of the district court as to when Petitioner's needed to file their response. The following exchange between counsel and the court occurred:

> MR. BOSCH: Okay. I'll get it filed as soon as I absolutely can.
>
> THE COURT: Yeah, we're not attempting to change the rules with regard to your opportunity to answer.
>
> MR. BOSCH: Okay.
>
> THE COURT: If you'll get it as soon as possible, it obviously will help us.
>
> MR. BOSCH: I'll do everything I can. I think there's more than just the waiver issue, which I think is definitive, but I just want to make sure those other things are brought out.
>
> THE COURT: Yeah, that's all I came up with. That's just me sitting there. That's my immediate reaction.

Pet. App. 33a.

Wyoming District Court Local Rules of Civil Procedure provide that a party opposing a non-dispositive motion shall "... within ten (10) days (excluding weekends and holidays) after service of said motion, serve upon all parties a written response containing a short, concise statement of the argument and authorities in opposition to the motion." Wyo. D. C. L. R. Civ. P. 7.1(b)(1)(B). The Local Rules also specifically provide that if a party objects to a motion to amend "...the Court will **consider the objection after response is filed and may decide the matter upon the pleadings or upon hearing.**" Wyo. D. C. L. R. Civ. P. 15.1(emphasis in the original).

Six days later[1] on January 16, 2008 at 8:21am, the district court, without allowing the filing of a response by Petitioner and without any argument, granted Respondents' motion for leave to amend their answer and ruled that the answer was "deemed" amended to include a statute of limitations defense. The district court further ordered that Petitioners would have five days to respond to the statute of limitations defense.

At 8 pm on January 16, 2008, Petitioners filed their "Response to Defendant's Affirmative Defenses" and included therein a response to the motion for leave to amend. Petitioners' response included a request for additional time to conduct discovery on the brand new statute of limitations defense. The district court made no inquiry into the cause for the undue delay in filing the motion to amend.

---

[1] This excludes the intervening weekend days that are not to be used in calculating response time.

1. **Whether a party is denied due process of law by a federal district court's order allowing the untimely filing of a statute of limitations defense without the district court giving notice and an opportunity to be heard to the party in direct contravention of local rules of procedure and the district court's oral representations to party's counsel.**

Petitioners believe that they had a right to be heard on the motion for leave to amend and that the district court violated their due process rights. As this Court noted, many controversies have "...raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether [appellant] was deprived of a protected interest, and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (U.S. 1982).

A cause of action is a "species" of property protected by the due process clause. 455 U.S. at 428. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.*; *Societe Internationale v. Rogers*, 357 U.S. 197 (1958)('property' component of the Fifth Amendment's Due Process Clause imposes 'constitutional limitations

upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'); *see also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-351 (1909) (power to enter default judgment); *Hovey v. Elliott*, 167 U.S. 409 (1897) (same).

A party's right to pursue a cause of action does not offer the traditional bundle of rights associated with the ownership of property. *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 989-990 (9th Cir. Cal. 1987).

> Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that 'deprivation . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'

Id. citing Mullane, *supra*.

"A fundamental requirement of due process is 'the opportunity to be heard.' [citation omitted]. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (U.S. 1965)(a court of appeals cannot cure due process violations simply by granting a hearing on appeal, which effectively results

in shifting the burden of proof from one party to the other).

In this matter, a pending motion for leave to amend was being considered by the district court to allow the addition of a statute of limitations defense: (1) long after discovery was closed, (2) well after the deadline for dispositive motions and (3) on the eve of trial. It is not in dispute that the district court ruled without giving Petitioners the right to be heard pursuant to and in the time frame set forth in its local rules. Petitioners even asked whether the district court was shortening the time period within which to answer and the court said "no."

Given that the district court granted leave to amend and immediately *sua sponte* converted the motion for leave to amend into one for summary judgment underscores the substantial rights at issue. Yet, Petitioners were provided no opportunity to respond. The district court ignored its own rules, which Petitioners relied upon to their detriment and harm. This is a violation of Petitioners' due process rights under the Fifth Amendment. It further shifted the burden from Respondent to Petitioner without due process. *See Armstrong*, *supra*.

The court of appeals found that Petitioners' due process argument was undermined by the fact that appeals courts give great deference to local court's interpretations of local rules citing to several cases in a footnote in its opinion. Pet. App. 9a-10a. The court of appeals failed to acknowledge that although a court is given broad discretion in promulgating, administering and interpreting its own rules, the court is also bound by these rules. *United States v. Ferretti*, 635 F.2d 1089,

1093 (3d Cir. Pa. 1980). Once local rules have been promulgated, lawyers and their clients have a right to place reasonable reliance on them. *Id.* To set the strictures of a local rule to one side without advance notice, the court (1) must have a sound reason for doing so, and (2) must ensure that no party's substantial rights are unfairly jeopardized. *United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. P.R. 1989); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 679 (2d Cir. 1971)(once rules are promulgated they cannot be "blithely" ignored).

The local court rules provided Petitioners with an opportunity to be heard on motions before the court. Petitioners even asked if the district court was changing the rules and the district court replied it was not. Yet, the district court ruled six days later, well before the time period ran to file a response – violating Petitioners' due process rights.

2. **Whether a party is denied due process of law by a federal court of appeals' denial to hear issues raised on appeal pursuant to 28 U.S.C. § 1291 where the party is prohibited from raising these issues because the lower court denied the party an opportunity to be heard.**

The violation of Petitioners' due process rights was further perpetuated by the court of appeals. It is clear that Petitioners had the right to appeal the district court's decision to the court of appeals. *See* 28 U.S.C. § 1291. One of the issues raised by Petitioners on appeal was the application of Federal Rule of Civil Procedure, Rule 16, to Respondents' motion for leave

to amend.[2] The court of appeals, however, refused to address this issue finding that it was not raised below. Because the district court ruled without the benefit of any response from Petitioners, they were effectively prevented from raising any issue. The court of appeals' violation of Petitioners' due process rights caused substantial harm in that Rule 16 would have undoubtedly resulted in the denial of the motion for leave to amend.

The court of appeals recognized that Federal Rule of Civil Procedure, Rule 16, applies to the Respondents' motion for leave to amend as it was effectively attempting to modify the district court's pretrial order to allow the untimely filing of a dispositive motion. *See SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518-19 (10th Cir. 1990)(addressing application of Rule 16 to party adding counterclaims after deadline in pretrial scheduling order); *see also Minter v. Prime Equipment Co.*, 451 F.3d 1196, n.4 (10th Cir. 2006). A pretrial scheduling order may be modified "if it cannot reasonably be met despite the diligence of the party seeking the extension." *See* Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment). "Because diligence is the focus of the inquiry, prejudice to the party opposing the modification is not a prerequisite;..." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609-610 (9th Cir. Cal. 1992). Respondents' motion for leave to amend

---

[2] Fed. R. Civ. P. 16(d) provides that a scheduling order may be amended for "good cause." F.R.C.P. 16(d).

fails as no evidence of good cause exists or was offered.[3]

The court of appeals refused to consider this argument as it was not raised below citing to *Stewart v. U.S. Dept. of Interior*, 554 F.3d 1236, 1245 n.1 (10th Cir. 2009). Although the *Stewart* decision provides little guidance, the court of appeals provided some explanation in *Cummings v. Norton*, 393 F.3d 1186 (10th Cir. Utah 2005) stating:

> In order to preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time . . . . Thus, an issue must be presented to, considered [and] decided by the trial court before it can be raised on appeal.

393 F.3d at 1190-1191.

It is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (U.S. 1940)(*citing Blair v. Oesterlein Co.*, 275 U.S. 220, 225 (1927); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

---

[3] The reason for the delay was the oversight of Respondents' counsel. An attorney's lack of oversight or negligence is not good cause. *Scottsdale Ins. Co. v Okla. Transit Auth., Inc.*, 2007 U.S. Dist. LEXIS 69857 (N.D. Okla. Sept. 20, 2007).

Because the court ruled prior to Petitioners being heard, Petitioners were prevented from raising any issue before the district court. Thus, the court of appeals denial on this basis only perpetuates the due process violation and increases the harm to Petitioners.

3. **Whether Federal Rule of Civil Procedure 15(a) requires the moving party to prove good cause for its undue delay in filing a motion for leave to amend an answer to add a statute of limitations defense for the first time under the following circumstances: (1) months after the close of discovery, (2) months after deadline for dispositive motions and (3) on the eve of trial.**

The district court focused solely on the unfair prejudice to Petitioners in granting leave to amend pursuant to Federal Rule of Civil Procedure, Rule 15. Although the district court recognized the "tremendous" nature of the prejudice to Petitioners, the district court, without giving Petitioners an opportunity to respond, held that the prejudice was not "unfair." The district court completely ignored the reasons, or lack of reasons, for the undue delay in Respondents' filing for leave to amend.

This Court has recognized that in the absence of any apparent or declared reason -such as undue delay, bad faith or dilatory motive on the part of the movant – leave to amend should be granted. *Foman v. Davis*, 371 U.S. 178 (1962). The courts of appeals are not in agreement regarding the showing necessary to establish "undue" delay. The majority of circuits hold

that an amendment may be denied for undue delay only if the trial court finds prejudice, bad faith, futility, or (in some circuits) a substantial burden on the court.[4] The minority rule is that the focus is primarily on the reasons for the delay – i.e. when the

---

[4] The majority rule is followed by the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits. See *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) ("Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." (internal quotation marks omitted)); *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) ("Delay alone is an insufficient reason to deny leave to amend. Rather, the delay must be accompanied by prejudice, bad faith, or futility.") (internal citation omitted); *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004) ("[D]elay alone is an insufficient basis for denial of leave to amend: The delay must be undue, i.e., it must prejudice the nonmoving party or impose unwarranted burdens on the court."); *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 458-59 (6th Cir. 2001) ("Delay by itself is not sufficient reason to deny a motion to amend. Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted."); *Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 922 (7th Cir. 1999) ("[M]ere delay, without a showing of prejudice, is not sufficient to deny the amendment."); *Doe v. Cassel*, 403 F.3d 986, 991 (8th Cir. 2005) ("Delay alone is not enough to deny a motion to amend; prejudice to the nonmovant must also be shown." (internal quotation marks omitted)); *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) ("Undue delay by itself . . . is insufficient to justify denying a motion to amend . . . [absent] a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party, or futility of amendment."); *Atchinson v. Dist. of Columbia*, 315 U.S. App. D.C. 318, 73 F.3d 418, 426 (D.C. Cir. 1996) ("Consideration of whether delay is undue, however, should generally take into account the actions of other parties and the possibility of any resulting prejudice.")

party filing the motion has no adequate explanation for the delay the motion should be denied.[5]

At some point if a party lets her claims lie "fallow", the burden shifts to her to show good cause for the delay. *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15 (1st Cir 1979). There is no prescribed period of time when leave to amend becomes unduly delayed, but undue delay is directly related to the moving party's knowledge and stage of the proceedings. *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998). Thus, where the plaintiff was aware of all the information on which his proposed amended complaint was based prior to filing the original complaint and waited late in the game, the motion is denied without good cause. *Id.*

Justice requires that party not sit on her rights. Here, the Respondents knew of all the facts that formed the basis for their motion for leave to amend to

---

[5] This approach is followed by the First, Third, Tenth, and Eleventh Circuits. See *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979) ("[W]here, as here, a considerable period of time has passed between the filing of the complaint and the motion to amend, courts have placed the burden upon the movant to show some valid reason for his neglect and delay." (internal quotation marks omitted)); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) ("When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied."); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1206-1207 (10th Cir. Okla. 2006); *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227, 1237 (11th Cir. 2005) ("We agree with the district court that [Plaintiff's] explanations for its delay in filing for leave to amend do not demonstrate that justice required the grant of the motion to amend.").

add the statute of limitations[6], yet waited until after discovery was closed, after the deadline for dispositive motions, and on the eve of trial, before raising the motion. At that point, Petitioners had no way to respond to the statute of limitations defense and requested of the court time to conduct additional discovery. The district court, however, did not inquire into the reasons, or lack of reasons, for the undue delay, but only made a determination that the "tremendous" prejudice was not unfair. At this stage in the proceedings, fundamental fairness and due process should require that the burden be on the moving party to provide good cause for the delay. This is the approach taken by the First, Third, Tenth, and Eleventh Circuits, and should be adopted by this Court.

REASONS FOR GRANTING THE WRIT

1. The importance of due process and fundamental fairness in the administration of justice warrants this Court's guidance for district courts and court of appeals on the due process implications of blithely ignoring rules of procedure.

Petitioners could not find any decision from this Court or any lower court that clearly explains what

---

[6] Petitioners do not concede that the facts known were sufficient to allow a ruling by the district court. To the contrary, Petitioners argued before the district court and court of appeals that the factual nature of the statute of limitations defense warranted Petitioner be given notice and opportunity to conduct some discovery on the issue.

due process rights a party enjoys in pursuing a state law tort claim in federal court. Dicta from other opinions suggests that a citizen of the United States enjoys the right to pursue his claims or present her defenses. This right is protected by the due process clause, but to what extent, under what circumstances. It appears that such will be decided on a case-by-case basis given the generally factual nature of due process inquiries, but some guidance from this Court is important - not to these parties - but to the public in pursuing fair administration of disputes in our judicial system.

2. This Court should resolve the disagreement amongst the circuits as to whether or not undue delay alone is sufficient to warrant the denial of leave to amend without some showing of good cause for the undue delay.

Federal Rule of Civil Procedure 15 provides guidance to courts on when amendments to pleadings should be allowed and disallowed. Through years of decisions, the circuits have developed two distinct and very different approaches to determining whether leave to amend should be granted. The first approach is that undue delay is not enough to warrant denial without an additional showing of the movant's bad faith or unfair prejudice to the non-moving party. *See e.g. Block v. First Blood Assocs.*, 988 F.2d 344 (2d Cir. 1993). This places the burden on the non-moving party to establish "bad faith" or unfair prejudice no matter when leave to amend is filed – even if the motion is filed after the deadline established by the court for amendments. *See e.g. Minter*, *supra*. The second approach shifts the burden to the moving party to

show good cause as to why they unduly delayed in filing for leave to amend. This approach is consistent with the overall purpose of the rules of civil procedure – i.e. that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. F.R.C.P. 1. To allow leave to amend at any stage of the proceedings – mainly on the eve of trial – without good cause, does not meet this purpose and only frustrates the pursuit of justice. Guidance from this Court to the circuits is warranted.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

Mel C. Orchard, III
Counsel of Record
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 548
Jackson, WY 83001
307-733-7290

Gerard R. Bosch
LAW OFFICES OF JERRY BOSCH, LLC
6320 Paintbrush Trail
P.O. Box 872
Wilson, WY 83014
307-734-9778
Attorneys for Petitioners Robert and Sandie Bylin

November 6, 2009